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Attorneys for Plaintiff
NUVASIVE, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NUVASIVE, INC.,

Plaintiff,

v.

CADWELL INDUSTRIES, INC.,

Defendant.

Case No. **'12CV3065 BTM JMA**

**COMPLAINT FOR PATENT
INFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiff NuVasive, Inc. ("NuVasive") files this Complaint and Demand for Jury Trial seeking relief for patent infringement by Defendant Cadwell Industries, Inc. ("Cadwell"), stating and alleging the following:

I. PARTIES

A. NuVasive, Inc.

1. Plaintiff NuVasive, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in San Diego, California.

2. NuVasive is an innovative medical device company focused on developing minimally disruptive surgical products and procedures for the spine. NuVasive makes and sells over 75 products spanning the entirety of the spine for reconstructive surgery and including neuromonitoring devices and services as well as a biologics portfolio. NuVasive's product development focus has been the innovation of products that treat spine disorders in a minimally

1 invasive fashion to deliver unmatched surgical outcomes with minimal collateral disruption to
2 patients' health and wellbeing.

3 3. Founded in 1999, NuVasive has experienced extraordinary growth and currently is
4 the fourth-largest spine company in the U.S., and the fifth-largest globally. NuVasive employs or
5 engages more than 1,500 people at its corporate headquarters in San Diego, California and at its
6 additional offices around the world.

7 4. NuVasive is well known for developing the XLIF[®] ("eXtreme Lateral Interbody
8 Fusion") procedure, a minimally disruptive procedure that allows spine surgeons to have direct
9 access to the intervertebral disc space (the "joint" of the spine) from the side of the body, as
10 opposed to from the front or back. A traditional "open" spine surgery often requires an incision
11 that is at least 4-6 inches and causes significant trauma when accessing a patient's spine from the
12 front or back, whereas XLIF typically requires an incision that is much smaller and results in
13 significantly less patient trauma. NuVasive's XLIF procedure has helped many patients
14 experience extraordinary results—they are often walking the same day of surgery, experiencing
15 less blood loss and trauma, spending less time in the hospital, and are back to work within weeks
16 (versus months following traditional back surgery).

17 5. NuVasive also has developed a revolutionary intraoperative neuromonitoring
18 system (NVJJB[®]/M5[®], hereinafter "NVM5"), designed to help promote nerve and spinal cord
19 safety and reduce the incidence of injury to neural elements during spinal procedures by
20 providing real-time feedback and notifying surgeons immediately of any neurological insult. This
21 intraoperative neuromonitoring allows a surgeon to avoid contact with nerves during the course of
22 the surgical procedure. For example, during the XLIF procedure the surgeon inserts elongated
23 dilators through a small incision in the patient's side and through the muscle on the side of the
24 vertebrae (psoas muscle) to reach the spine. During this process the surgeon does not have a clear
25 view of the psoas and cannot easily identify and avoid nerves. The NVM5 system solves this
26 problem by continually scanning for nerves and providing instant audio and/or visual feedback
27 when a nerve response is detected, helping the surgeon reach the appropriate spot on the spine for
28 the repair while avoiding damage to nearby nerves.

1 6. Additionally, NuVasive's revolutionary nerve detection and monitoring system is
2 used in connection with spinal procedures, including a majority of the XLIF procedures
3 performed, that involve implantation of pedicle screws into the spine to secure intervertebral
4 implants. In the context of pedicle screw implantation and testing, NuVasive's NVM5 system
5 allows a surgeon to test the integrity of the bone surrounding the pedicle screw by monitoring the
6 activity of the nerve adjacent the pedicle. If a neuromuscular response is evoked with a low
7 enough level of stimulation, it may indicate that the bone has cracked during preparation for or
8 implantation of the pedicle screw and exposed the nerve to potential hazard. The NVM5 system
9 uses color-coded ranges and audible tones to immediately notify the surgeon of the suitability of
10 screw placement and relative safety of the nerve. NVM5 is used before, during and after pedicle
11 screw implantation to prevent contact with nerves and facilitate optimal placement of the screws.

12 7. NuVasive's products and procedures, including its XLIF procedure and NVM5
13 neuromonitoring system, have been used in hundreds of thousands of spine surgeries.

14 8. NuVasive has been granted dozens of patents in the area of lateral access spinal
15 surgery and intraoperative neuromonitoring, including the five patents asserted in this action.

16 **B. Cadwell Industries, Inc.**

17 9. Defendant Cadwell is a corporation organized and existing under the laws of the
18 State of Washington with a principal place of business in Kennewick, Washington.

19 10. Cadwell manufactures and sells a variety of medical devices in the area of
20 neurophysiology, including the Cascade[®] line of intraoperative neuromonitoring systems. This
21 line of products includes at least the Cascade, Cascade Pro and Cascade Elite systems.

22 11. On information and belief, Cadwell has sold the Cascade products since at least
23 2006, marketing them as neuromonitoring systems designed for use in a variety of surgical
24 procedures.

25 12. Cadwell sells its Cascade system with NerveGuard[®], an "automated pedicle screw
26 testing feature." NerveGuard "finds and reports stimulus threshold" during screw testing, which
27 the surgeon can use to determine whether the pedicle screw is properly seated, and whether there
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1 are any cracks in the bone. Like NuVasive's patented NVM5 system, NerveGuard uses a "[l]arge
2 color-coded reporting window and tones to let the surgeon instantly know the screw threshold."

3 13. In late 2011, Cadwell began marketing and selling its Cascade systems for use in
4 lateral spinal access surgery, advertising a "lateral module" for use in a procedure that infringes
5 NuVasive's patents. According to Cadwell's marketing materials for its Cascade system, the
6 "Cascade and software includes a lateral access module which allows monitoring of lateral access
7 cases[.]" Cadwell further advertises that the lateral access module employs an "[i]ntelligent,
8 nerve-hunting algorithm" that "provides audio and visual feedback in real-time on nerve
9 proximity via threshold detection." Like NuVasive's NVM5 system, Cascade's lateral module
10 provides visual feedback in the form of green, yellow and red threshold ranges to indicate relative
11 distance and proximity to a nerve.

12 14. NuVasive notified Cadwell of its infringement in or about October 2012,
13 specifically identifying the asserted patents that Cadwell's products infringe. Despite being
14 notified of its infringing conduct, Cadwell has continued to infringe the asserted patents by
15 marketing, selling, and providing training on the operation of its Cascade system.

16 II. JURISDICTION AND VENUE

17 15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1338.

18 16. This Court has personal jurisdiction over Defendant Cadwell pursuant to
19 California Code of Civil Procedure § 410.10. On information and belief, Cadwell has knowingly
20 and purposefully directed its wrongful acts to this forum, distributed, advertised and/or sold
21 products embodying NuVasive's inventions in this forum, actively solicited business in this
22 forum, and utilized interactive websites that permit residents of this forum to purchase products
23 embodying NuVasive's inventions over the internet and have these products shipped into this
24 forum.

25 17. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400 as
26 Plaintiff NuVasive is headquartered in this district, and Defendant Cadwell is subject to personal
27 jurisdiction in this judicial district, has done business in this judicial district, has committed acts
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1 of patent infringement in this judicial district, and continues to commit such acts in this judicial
2 district.

3 **FIRST CLAIM FOR RELIEF**
4 **(Infringement of U.S. Patent No. 7,522,953)**

5 18. Plaintiffs repeat and incorporate by reference the allegations set forth above.

6 19. On April 21, 2009, United States Patent Number 7,522,953 (the “’953 Patent”)
7 entitled “System and Methods for Performing Surgical Procedures and Assessments” was duly
8 issued to NuVasive, Inc. A true and correct copy of the ’953 Patent is attached hereto as Exhibit
9 1.

10 20. The ’953 Patent is valid and enforceable.

11 21. NuVasive is the owner, by assignment from the inventors, of all right, title and
12 interest in and to the ’953 Patent

13 22. Defendant Cadwell advertises, offers for sale, sells and/or facilitates the sale of
14 products that infringe the ’953 Patent, either literally and/or through the doctrine of equivalents.
15 The product lines sold by Cadwell that infringe the ’953 Patent include, but are not necessarily
16 limited to Cascade, Cascade Elite and Cascade Pro.

17 23. Cadwell had actual or constructive knowledge of NuVasive’s patent rights, knew
18 or should have known that the advertisement, offer for sale, sale, and facilitating of sale of the
19 infringing products would induce actual infringement, and/or acted with willful blindness to
20 NuVasive’s patent rights because, *inter alia*, in or about October 2012 and thereafter, NuVasive
21 directly informed Cadwell of its patent rights and that Cadwell was advertising, offering for sale,
22 selling, and facilitating the sale of the infringing products.

23 24. Cadwell has infringed and continues to infringe NuVasive’s ’953 Patent by direct
24 infringement, contributory infringement, and/or inducing others to infringe in violation of 35
25 U.S.C. § 271, through the advertising, using, selling, offering for sale, facilitating of sale, and/or
26 importation of at least the infringing Cascade, Cascade Elite, and Cascade Pro lines of products,
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1 and by promoting, teaching and/or providing training on the infringing use of at least the Cascade,
2 Cascade Elite, and Cascade Pro lines of products.

3 25. On information and belief, Cadwell's infringement of one or more claims of the
4 '953 Patent has been and continues to be willful, wanton and deliberate.

5 26. NuVasive is damaged and irreparably injured by Cadwell's infringing activities
6 and will continue to be so damaged and irreparably injured unless and until Cadwell's infringing
7 activities are enjoined by this Court.

8 **SECOND CLAIM FOR RELIEF**
9 **(Infringement of U.S. Patent 8,068,912)**

10 27. Plaintiffs repeat and incorporate by reference the allegations set forth above.

11 28. On November 29, 2011, United States Patent Number 8,068,912 (the "'912
12 Patent") entitled "System and Methods for Determining Nerve Proximity, Direction, and
13 Pathology During Surgery" was duly issued to NuVasive, Inc. A true and correct copy of the
14 '912 Patent is attached hereto as Exhibit 2.

15 29. The '912 Patent is valid and enforceable.

16 30. NuVasive is the owner, by assignment from the inventors, of all right, title and
17 interest in and to the '912 Patent.

18 31. Defendant Cadwell advertises, offers for sale, sells and/or facilitates the sale of
19 products that infringe the '912 Patent. The product lines sold by Cadwell that infringe the '912
20 Patent include, but are not necessarily limited to Cascade, Cascade Elite and Cascade Pro.

21 32. Cadwell had actual or constructive knowledge of NuVasive's patent rights, knew
22 or should have known that the advertisement, offer for sale, sale, and facilitating of sale of the
23 infringing products would induce actual infringement, and/or acted with willful blindness to
24 NuVasive's patent rights because, *inter alia*, in or about October 2012 and thereafter, NuVasive
25 directly informed Cadwell of its patent rights and that Cadwell was advertising, offering for sale,
26 selling, and facilitating the sale of the infringing products.
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1 33. Cadwell has infringed and continues to infringe NuVasive's '912 Patent by direct
2 infringement, contributory infringement, and/or inducing others to infringe in violation of 35
3 U.S.C. § 271, through the advertising, using, selling, offering for sale, facilitating of sale, and/or
4 importation of at least the infringing Cascade, Cascade Elite, and Cascade Pro lines of products,
5 and by promoting, teaching and/or providing training on the infringing use of at least the Cascade,
6 Cascade Elite, and Cascade Pro lines of products.

7 34. On information and belief, Cadwell's infringement of one or more claims of the
8 '912 Patent has been and continues to be willful, wanton and deliberate.

9 35. NuVasive is damaged and irreparably injured by Cadwell's infringing activities
10 and will continue to be so damaged and irreparably injured unless and until Cadwell's infringing
11 activities are enjoined by this Court.

12 **THIRD CLAIM FOR RELIEF**

13 **(Infringement of U.S. Patent 8,027,716)**

14 36. Plaintiffs repeat and incorporate by reference the allegations set forth above.

15 37. On September 27, 2011, United States Patent Number 8,027,716 (the "'716
16 Patent") entitled "System and Methods for Performing Surgical Procedures and Assessments"
17 was duly issued to NuVasive, Inc. A true and correct copy of the '716 Patent is attached hereto as
18 Exhibit 3.

19 38. The '716 Patent is valid and enforceable.

20 39. NuVasive is the owner, by assignment from the inventors, of all right, title and
21 interest in and to the '716 Patent.

22 40. Defendant Cadwell advertises, offers for sale, sells and/or facilitates the sale of
23 products that infringe the '716 Patent. The product lines sold by Cadwell that infringe the '716
24 Patent include, but are not necessarily limited to Cascade, Cascade Elite and Cascade Pro.

25 41. Cadwell had actual or constructive knowledge of NuVasive's patent rights, knew
26 or should have known that the advertisement, offer for sale, sale, and facilitating of sale of the
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1 infringing products would induce actual infringement, and/or acted with willful blindness to
2 NuVasive's patent rights.

3 42. Cadwell has infringed and continues to infringe NuVasive's '716 Patent by direct
4 infringement, contributory infringement, and/or inducing others to infringe in violation of 35
5 U.S.C. § 271, through the advertising, using, selling, offering for sale, facilitating of sale, and/or
6 importation of at least the infringing Cascade, Cascade Elite, and Cascade Pro lines of products,
7 and by promoting, teaching and/or providing training on the infringing use of at least the Cascade,
8 Cascade Elite, and Cascade Pro lines of products.

9 43. On information and belief, Cadwell's infringement of one or more claims of the
10 '716 Patent has been and continues to be willful, wanton and deliberate.

11 44. NuVasive is damaged and irreparably injured by Cadwell's infringing activities
12 and will continue to be so damaged and irreparably injured unless and until Cadwell's infringing
13 activities are enjoined by this Court.

14 **FOURTH CLAIM FOR RELIEF**
15 **(Infringement of U.S. Patent 7,935,051)**

16 45. Plaintiffs repeat and incorporate by reference the allegations set forth above.

17 46. On May 3, 2011, United States Patent Number 7,935,051 (the "'051 Patent")
18 entitled "Surgical Access System and Related Methods" was duly issued to NuVasive, Inc. A
19 true and correct copy of the '051 Patent is attached hereto as Exhibit 4.

20 47. The '051 Patent is valid and enforceable.

21 48. NuVasive is the owner, by assignment from the inventors, of all right, title and
22 interest in and to the '051 Patent.

23 49. Defendant Cadwell advertises, offers for sale, sells and/or facilitates the sale of
24 products that infringe the '051 Patent. The product lines sold by Cadwell that infringe the '051
25 Patent include, but are not necessarily limited to Cascade, Cascade Elite and Cascade Pro.

26 50. Cadwell had actual or constructive knowledge of NuVasive's patent rights, knew
27 or should have known that the advertisement, offer for sale, sale, and facilitating of sale of the
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1 infringing products would induce actual infringement, and/or acted with willful blindness to
2 NuVasive's patent rights.

3 51. Cadwell has infringed and continues to infringe NuVasive's '051 Patent by direct
4 infringement, contributory infringement, and/or inducing others to infringe in violation of 35
5 U.S.C. § 271, through the advertising, using, selling, offering for sale, facilitating of sale, and/or
6 importation of at least the infringing Cascade, Cascade Elite, and Cascade Pro lines of products,
7 and by promoting, teaching and/or providing training on the infringing use of at least the Cascade,
8 Cascade Elite, and Cascade Pro lines of products.

9 52. On information and belief, Cadwell's infringement of one or more claims of the
10 '051 Patent has been and continues to be willful, wanton and deliberate.

11 53. NuVasive is damaged and irreparably injured by Cadwell's infringing activities
12 and will continue to be so damaged and irreparably injured unless and until Cadwell's infringing
13 activities are enjoined by this Court.

14 **FIFTH CLAIM FOR RELIEF**

15 **(Infringement of U.S. Patent No. 8,050,769)**

16 54. Plaintiffs repeat and incorporate by reference the allegations set forth above.

17 55. On November 1, 2011, United States Patent Number 8,050,769 (the "'769 Patent")
18 entitled "System and Methods for Determining Nerve Proximity, Direction, and Pathology
19 During Surgery" was duly issued to NuVasive, Inc. A true and correct copy of the '769 Patent is
20 attached hereto as Exhibit 5.

21 56. The '769 Patent is valid and enforceable.

22 57. NuVasive is the owner, by assignment from the inventors, of all right, title and
23 interest in and to the '769 Patent

24 58. Defendant Cadwell advertises, offers for sale, sells and/or facilitates the sale of
25 products that infringe the '769 Patent. The product lines sold by Cadwell that infringe the '769
26 Patent include, but are not necessarily limited to Cascade, Cascade Elite and Cascade Pro.
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59. Cadwell had actual or constructive knowledge of NuVasive's patent rights, knew or should have known that the advertisement, offer for sale, sale, and facilitating of sale of the infringing products would induce actual infringement, and/or acted with willful blindness to NuVasive's patent rights.

60. Cadwell has infringed and continues to infringe NuVasive's '769 Patent by direct infringement, contributory infringement, and/or inducing others to infringe in violation of 35 U.S.C. § 271, through the advertising, using, selling, offering for sale, facilitating of sale, and/or importation of at least the infringing Cascade, Cascade Elite, and Cascade Pro lines of products, and by promoting, teaching and/or providing training on the infringing use of at least the Cascade, Cascade Elite, and Cascade Pro lines of products.

61. On information and belief, Cadwell's infringement of one or more claims of the '769 Patent has been and continues to be willful, wanton and deliberate.

62. NuVasive is damaged and irreparably injured by Cadwell's infringing activities and will continue to be so damaged and irreparably injured unless and until Cadwell's infringing activities are enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff NuVasive prays for judgment as follows:

A. A judgment that Cadwell has infringed and continues to infringe U.S. Patents Nos. 7,522,953, 8,068,912, 8,027,716, 7,935,051 and 8,050,769 in violation of 35 U.S.C. § 271;

C. Preliminary and permanent injunctive relief pursuant to 35 U.S.C. § 283 against any further infringement, active inducement of infringement, and contributory infringement of U.S. Patents Nos. 7,522,953, 8,068,912, 8,027,716, 7,935,051 and 8,050,769 by Cadwell, its officers, agents, servants, employees, attorneys, and those persons in active concert or participation with Cadwell;

D. An award of damages pursuant to 35 U.S.C. § 284 arising out of Cadwell's infringement of U.S. Patents Nos. 7,522,953, 8,068,912, 8,027,716, 7,935,051 and 8,050,769, together with prejudgment and post-judgment interest;

E. A determination that Caldwell's infringement is and was willful and that this is an

1 exceptional case under 35 U.S.C. § 285;

2 F. An award of enhanced damages and the attorneys' fees and costs incurred by
3 Plaintiff NuVasive; and

4 G. For such other and further relief as the Court may deem just and proper.
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6 Dated: December 27, 2012

MORRISON & FOERSTER LLP

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8 By: /s/ Eric M. Acker
Eric M. Acker

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10 Attorneys for Plaintiff
NUVASIVE, INC.
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